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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of the Childhood and Government Project in Support of Respondent Children

We present this brief in support of Respondent children with the consent of the parties pursuant to Supreme Court Rule 42. Copies of letters of consent are filed herewith.

INTEREST OF AMICUS CURIAE

The Childhood and Government Project of the Earl Warren Legal Institute, The School of Law, University of California, Berkeley, California, was established in 1972. It is funded by the Ford Foundation and the Carnegie Corpora-

tion of New York. The Project is concerned with all phases of governmental policy and action which directly affect the lives of children, particularly in the context of elementary and secondary schooling. This case is of special interest to the Project because it raises significant constitutional issues regarding the kinds of procedural constraints which public school officials must observe before the opportunity to receive an education can be withdrawn from a child. At stake here and of particular concern to Amicus is the question whether an interest as basic as the opportunity to attend school can be withdrawn for a substantial period of time, in the absence of emergency circumstances, without due process of law.

INTRODUCTION AND STATEMENT OF THE CASE

The most far-reaching issue presented by this case and briefed by the parties in this Court is an issue which neither court below decided: whether public school suspension and expulsion procedures must comply with Fourteenth Amendment due process standards. Amicus is particularly concerned, therefore, that this Court—in the process of affirming the indisputably broad discretionary power of school officials to discipline students free from excessive interference by the federal judiciary—not use a case such as this, in which the core issue has been so tangentially presented, as a vehicle for dramatically constricting the place of due process in the school suspension and expulsion context.

The questions presented in the petition for certiorari could be construed to exclude this basic issue, and to include only the issue of whether the Court of Appeals was correct in its conclusions (1) that there was no evidence to support the Respondents' expulsion; (2) that such absence of evi-

dence constituted a basis for action under Title 42 U.S.C. Section 1983; and (3) that school officials might be held liable for damages under Section 1983 without a showing of malice.

This Court might, however, choose to reach the central issue of fundamental fairness in school suspensions and expulsions, because Petitioners broadly argue that due process does not apply at all in school suspension cases (Petitioners' Brief, p. 15). The procedural due process issue may accordingly be subsumed within Petitioners' first question. (See Supreme Court Rule 23). Moreover, Respondents, although not cross-petitioning, have sought to present procedural arguments to justify the result below. (Response to Petition, pp. 5, 19, 20, 26). Under similar circumstances, this Court has previously held that questions such as the procedural due process issue in this case can be reached and decided. See *Langnes v. Green*, 282 U.S. 531 (1931); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931); *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).

Amicus submits this brief to rebut Petitioners' claim that due process has no place in school suspensions and to indicate the constructive role that can be played by due process in cases where severe penalties, such as lengthy suspensions and expulsion, are being assessed against specific individuals. This brief does not address the narrower question whether the Court of Appeals exceeded its proper role in determining on the facts of this case that the School Board had misapplied its own regulation prohibiting the use of "intoxicating" beverages.

This case arises out of the lengthy suspension of Respondents and one other girl from high school for allegedly "spiking" the punch at a school function on February 7,

1972.[1] The suspensions "for the balance of the semester" had, as found by the Court of Appeals, the practical effect of causing the girls to fail their entire sophomore year. (Petition for Cert., Appendix, p. 3, n. 1).

On February 18, 1972, the girls were taken to the principal, who suspended them from school on the spot for one week[2] and indicated that the matter would at some point be referred to the School Board for further action. (Appendix, p. 26). After talking to the girls, the principal arranged for a meeting of the School Board to be held the same evening to consider the matter. No notice of the Board meeting was given either to the girls or to their parents.[3] (Appendix, p. 54). Neither the girls nor their parents were present at the February 18 meeting. Acting in their absence, the Board that evening suspended the girls for the balance of the term. (Appendix, p. 105).

Notice of the action already taken was given to Respondents and their parents on February 19. On February 24

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1. On February 17, 1972, on urging from their home economics teacher, Mrs. Powell, the three girls told what they had done. The Court of Appeals described the incident:

> "[O]n the day of the spiking incident, someone (it is not clear who) suggested that the punch be spiked. The three girls obtained permission to leave the campus and traveled to a tavern in Oklahoma where Jo Wall, not a party to this action, purchased two 12-ounce bottles of a flavored malt beverage, "Right Time." The three students then purchased six 10-ounce containers of soft drink and combined the total eighty-four ounces of liquid in a milk carton, and returned with the mixture to school. To the liquid was then added enough water to total one and one-half gallons of punch, which was served at the gathering." (Petition for Cert. Appendix p. 2)

2. The principal acted on the mistaken belief—conveyed to him by one of the girls—that the alcoholic content of Right Time was 20%. (Appendix, p. 52). In point of fact, the alcoholic content, according to the manufacturer, was 3.2% or less. (Appendix, p. 94).

3. Curiously, while no notice was given to the parties directly affected, notice was given to the press. (Appendix, p. 55).

the parents were notified that they could appear before the next regular meeting of the Board, scheduled for March 14, in order to petition for reinstatement of their daughters. (Appendix, pp. 137-138). The parents were then informed, on February 29, that there would be a special meeting of the Board on March 2, 1972, and that they could appear with counsel at that meeting. (Appendix, p. 138).

At the March 2 meeting, the Board refused to alter the action previously taken by it on February 18.

On March 6, 1972, the instant action was filed by Respondents in the Federal District Court, Western District of Arkansas, alleging a claim under Title 42 U.S.C. Section 1983, and seeking a declaratory judgment, injunctive and such other relief as would be appropriate. (Appendix, p. 6). On March 7, 1972, after a hearing, the trial court entered an order denying Respondents' motion for preliminary injunction. (Appendix, p. 84). While expressing considerable concern about the fairness of the procedure and the severity of the punishment, the trial court held that it was without jurisdiction to review the action of the School Board. The trial court entered no formal findings as to the adequacy of either the February 18 or March 2 School Board actions. (Appendix, pp. 78-84).

On March 14, 1972, Respondents amended their complaint, adding a claim for damages under Section 1983. (Appendix, p. 91).

On July 21, 1972, the trial court entered an order denying Petitioners' (Defendants') motion for partial summary judgment and set the case for trial before a jury. Trial was held on August 17, 18, 19 and 21, 1972. The jury was unable to reach a verdict, and a mistrial was declared.

On September 29, 1972, the trial court entered an order on renewed motion of Petitioners for judgment. The court

found that malice had not been shown, and held that Respondents (Plaintiffs) therefore could not sustain an action for damages under Section 1983. Again, the District Court made no findings regarding the procedural sufficiency of the School Board actions of February 18 and March 2. (The opinion of the District Court is incorporated in the Petition for Cert., Appendix, pp. 15-34).

The Court of Appeals reversed, on the basis that what it called "substantive due process" had been violated at both the February 18 and March 2 meetings of the School Board. In passing, the Court of Appeals also found the February 18 meeting procedurally deficient. Because of its construction of the case, the court refused to determine whether the March 2 meeting could have cured the deficiencies in the February 18 meeting. Thus the case reaches this Court with no determination, by either federal tribunal below, whether the Respondents were denied procedural due process by the manner of their suspensions.

SUMMARY OF ARGUMENT

In Section I, we argue that Respondents' interest in continuing their education at a public high school is the kind of "liberty" and "property" interest protected under the Due Process Clause. Expulsion from the public school is a grievous injury to Respondents, interfering greatly with their life prospects, injuring their reputations in the community, and depriving them of opportunities to which state law itself entitles them. The public school systems of this nation clearly are not enclaves of totalitarianism beyond the reach of the Fourteenth Amendment, and thus school officials must provide a fair hearing to students when the expulsion sanction is employed. In Section II, we outline the minimum safeguards we believe due process requires in

school discipline cases. Finally, in Section III, we seek to show that the February 18 proceeding at which Respondents were suspended did not comply with due process requirements and that the March 2 meeting of the Board cannot be said, on this record, to have cured this defect. Accordingly, we urge this Court to remand for further proceedings.

ARGUMENT

I. The Due Process Clause Applies to the Respondents' Expulsion from Public High School.

A. INTRODUCTION.

More than fifteen years ago, Professor Warren A. Seavey of the Harvard Law School wrote a short article expressing outrage at the lack of procedural safeguards for students expelled or suspended from public schools and colleges. He noted that the harm to a student stemming from exclusion was great: the student would have no opportunity to prove his innocence, the stigma of the alleged wrong would follow the student well beyond the school setting, and, most importantly, the student's ability to obtain future employment would be severely curtailed. While the infraction might be trivial, the punishment certainly was not. He expressed disbelief that the courts could be moved to extend procedural due process guarantees in so many areas, while ignoring the plight of the student entirely at the mercy of public school authorities:

> At this time when many are worried about dismissal from public service, when only because of the over-

> riding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, *our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state education institution, which can function properly only if our freedoms are preserved, should not observe the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.*

W. Seavey, "Dismissal of Students: 'Due Process,'" 70 Harv.L.Rev. 1406, 1407 (1957) (Emphasis added).

Since Professor Seavey wrote his landmark article, the federal courts have moved forcefully in the direction of affording procedural due process rights to students attending public educational institutions. The path-breaking case was *Dixon v. Alabama Board of Education*, 294 F.2d 150 (5th Cir. 1961), in which Judge Rives, writing for a unanimous court, rejected the old clichés and formalisms which, for so long, had denied students their due process rights. The question was not whether students had a right to attend public schools or only a privilege to do so, nor was the question the extent to which parents had delegated their parental responsibilities to school authorities:

> It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." . . . That argument was emphatically answered by the Supreme Court in [*Cafeteria and Restaurant Workers*

> *Union v. McElroy*, 367 U.S. 886, 894 (1961)]. . . . "One may not have a constitutional right to go to Bagdad, but the government may not prohibit one from going there unless by means consonant with due process of law."
>
> . . .
>
> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning. . . . It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society . . . [P]laintiffs [were] . . . . injured by the interruption of their course . . . in midterm. *Dixon v. Alabama, supra,* at 156-157.

The *Dixon* decision, emanating from a single circuit, quickly became the law of the land. See generally W. Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 U.Pa.L.Rev. 545 (1971); C. Wright, "The Constitution on the Campus," 22 Vand.L. Rev. 1027 (1969). Due process rights were extended to students in public elementary and secondary schools by all eleven circuit courts of appeal. See, e.g., *Williams v. Dade County School Board*, 441 F.2d 299 (5th Cir. 1971); *Linwood v. Board of Education*, 463 F.2d 763 (7th Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807 (2nd Cir. 1967); *Tate v. Board of Education*, 453 F.2d 975 (8th Cir. 1972). Many state courts reached the same conclusion. See, e.g., *R.R. v. Board of Education*, 109 N.J. Super. 337, 263 A.2d 180 (1970); *Charles S. v. Board of Education*, 20 Cal. 3d 83, 97 Cal.Rptr. 422 (1971). Although the principles announced in non-school cases by this Court amply support the actions of these state and federal courts,[4] their unanimity is all

4. See, e.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Greene v. McElroy*, 360 U.S. 474 (1959); *Slochower v. Board of Education*, 350 U.S. 551 (1956).

the more striking in view of the absence of an explicit Supreme Court ruling in a school expulsion case.

Despite this history, Petitioners argue that due process guarantees are inapplicable to public high school students. They ask for the repudiation of a principle which has been found workable, fair, and not unduly restrictive of the rightful discretion of public school officials in student discipline matters; and the substitution of a principle grounded on their unsubstantiated fears. If the observance of due process procedures in the public schools is the first step toward chaos, "the second step has been long in coming." *Walz v. Tax Comm'r.*, 397 U.S. 664, 669 (1970). Thus, Petitioners ask this Court to wipe out, with one bold stroke, the progress of nearly fifteen years. They would subject students to the unfettered authority of school officials to do grave injury to their life prospects without any opportunity to refute the charges made against them. To ask the Court to take this step in an expulsion case, involving a complete denial of all educational opportunities for a substantial time, is all the more astounding.

The interest involved in a public school expulsion decision is precisely the sort of interest that the Due Process Clause has historically protected. As Mr. Justice Frankfurter stated, the Court has long recognized "the right to be heard before being condemned to suffer grievous loss of any kind even though it may not involve the stigma and hardships of a criminal conviction." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Mr. Justice Frankfurter, concurring). Respondents suffered grievous harm in this case, being deprived of all educational opportunity for a substantial period of time. They had no choice but to suffer this deprivation in light of the heavy financial burden of securing a private education. See *Griswold v. Connecticut*, 381 U.S. 479, 525 (1965) (Mr. Justice White, concurring). In addition, their asserted infraction is now a part of their permanent record, and thus is likely to have a continuing impact on their life prospects. Thus, their expulsion certainly has a stigmatizing effect on them, reducing their standing with peers, teachers, and administrators, and ultimately their ability to secure a higher education and gainful employment.

These harms are all the more striking in the absence of a fair hearing. The particularized standards for expulsion under Arkansas law and the school's rules are meaningless absent a hearing in which Respondents have the opportunity to present their side of the case. They must be able to attempt to refute the charge that the rules may be appropriately applied to punish them for their personal actions. In this regard, individualized proceedings are absolutely essential to the illumination of facts bearing on their alleged misconduct. Otherwise, there is every reason to doubt the accuracy of the School Board's final determinations. Moreover, the legitimacy of the exercise of power by school authorities is seriously open to question when they refuse to abide by standards of fairness. Mr. Justice Frankfurter has stated these underpinnings of procedural due process with characteristic eloquence:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and op-

> portunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refuge Comm. v. McGrath, supra, at 171 (Mr. Justice Frankfurter, concurring).

B. RESPONDENTS WERE DEPRIVED OF AN INTEREST IN LIBERTY AND PROPERTY WHEN THEY WERE EXPELLED FROM PUBLIC HIGH SCHOOL.

The Due Process Clause of the Fourteenth Amendment does not, of course, apply to all conceivable deprivations suffered by an individual at the hands of the state. To determine whether a particular deprivation is within the scope of the Due Process Clause, the Court has asked "whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972). The interests protected by the Due Process Clause are not limited to real estate or chattels or to a deprivation of physical liberty pursuant to the criminal process. *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972). See also *Bell v. Burson,* 402 U.S. 535 (1971); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). Nor is the "wooden distinction" between "rights" and "privileges" determinative of a due process inquiry. *Board of Regents v. Roth, supra,* at 571. See also *Arnett v. Kennedy,* 94 S.Ct. 1633, 1650 (1974) (Mr. Justice Powell, concurring in part); *Graham v. Richardson,* 403 U.S. 365, 374 (1971) (Opinion of Mr. Justice Blackmun); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

1. Respondents have been deprived of an interest in liberty.

The notion of liberty embodied in the Due Process Clause has never been given any precise or limited definition by this Court. This is altogether appropriate, since "in a constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth, supra,* at 572. The framers did not lightly assume that what was not expressly forbidden to government was a proper subject for unlimited government intervention; for much of the private role of the individual, assumed by all as "essential to the orderly pursuit of happiness by free men," would then be overwhelmed by governmental decision-making. *Meyer v. Nebraska, supra,* at 399. However, to guarantee such liberty absolutely would be to force the constitution into an undue restraint upon the operations of the government. The brilliant answer to this dilemma, embodied in the Due Process Clauses of the 5th and 14th Amendments, was that the private liberties of the people could be curtailed only where the state observed stringent standards of fairness. As Mr. Justice Marshall has put the matter:

> One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government . . . It is a corollary of this requirement that, in order to determine whether persons are indeed similarly situated, "such procedural protections as the particular situation demands" must be provided. *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972).

U.S. Department of Agriculture v. Murry, 413 U.S. 508, 517 (1973) (Mr. Justice Marshall, concurring). If adequate hearing procedures were observed, if a fair and even-handed application of the law were required, then, by definition, government would not lightly interfere with the liberties of the people.

Against this basic philosophical background, the Court has described an interest as falling within the concept of

"liberty" under the Due Process Clause in circumstances involving no physical restraint: when the government interferes with the well-established prerogative of an individual to relate to other private parties, particularly in the family context, or to develop his personality and intellect (*Board of Regents v. Roth, supra,* at 572; *Meyer v. Nebraska, supra,* at 399; *Stanley v. Illinois,* 405 U.S. 645 (1972)); and when the government acts against the individual in such a fashion that his "good name, reputation, honor or integrity is at stake," *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971). See aso *Arnett v. Kennedy, supra,* at 1647, 1648 (Plurality opinion of Mr. Justice Rehnquist); *Board of Regents v. Roth, supra,* at 573. In the second group of cases, it is not so much the particular denial which leads to the characterization of the interest as a liberty—for example, the loss of public employment; rather, the manner in which the denial takes place is deemed to be critical. The denial may so stigmatize and injure the reputation of a citizen that it greatly and adversely affects his ability in the future to conduct his personal affairs, that is, to interact with private and public parties for his benefit. *Board of Regents v. Roth, supra,* at 574; *Arnett v. Kennedy, supra,* at 1646 (Plurality opinion of Mr. Justice Rehnquist); *Joint Anti-Fascist Refugee Comm. v. McGrath, supra,* at 185 (Mr. Justice Jackson, concurring). In this sense, the two lines of cases merge to protect one broad interest of the individual in liberty.

When this Court has provided illustrations of protected liberty interests, it has inevitably included the opportunity of an individual "to contract, to engage in any of the common occupations of life, *to acquire useful knowledge,* to marry, establish a home and bring up children." *Meyer v. Nebraska, supra,* at 399 (Emphasis added). See also

Board of Regents v. Roth, supra, at 572. The opportunity to remain in public school obviously is encompassed by these interests. Is not education the key to an individual's employment opportunities? Is not public schooling the most common way of acquiring useful knowledge? Is not public schooling, at least in the twentieth century, an integral part of the raising of children? Indeed, on a number of occasions, this Court has gone even further. In *Pierce v. Society of Sisters, supra,* the Court held that the state could not lightly interfere with the ability of parents to send their children to private schools, let alone their opportunity to send their children to the schools established by the community for public benefit. Where the state has chosen to establish a public school system, should not the opportunity to attend a public school be afforded a similar status? Indeed, in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 25 n. 60 (1973), Mr. Justice Powell, writing for the majority, intimated that if a child were "absolutely precluded from receiving an education," a more compelling case for judicial intervention would be posed than was presented by the merely relative financial disparities demonstrated in that case. If complete exclusion, as here, may give rise to substantive constitutional concerns under the Equal Protection Clause, the case is even more persuasive for affording minimal due process guarantees so that the individuals injured may challenge the evidentiary basis for their expulsion, and participate in the decisions that so intimately affect their lives. Cf. *Board of Regents v. Roth, supra,* at 575 n. 14.

If the question is approached from the perspective of stigmatization and injury to reputation, the characterization of Respondents' interest as liberty within the scope of the Due Process Clause is even clearer. Even where govern-

ment's power over a particular matter is virtually plenary, if the basis of the government's decision is such that it "might seriously damage his standing and the associations in his community," notice and an opportunity to be heard are required. *Board of Regents v. Roth, supra,* at 573. Compare *Wisconsin v. Constantineau, supra,* at 437 with *California v. LaRue,* 409 U.S. 109 (1972). The operative concept is one of grievous injury beyond that which would normally occur as a result of the government's decision.

Respondents are obviously stigmatized and injured in a number of ways by virtue of their exclusion for violating the school rule prohibiting intoxicating beverages. The interruption of their schooling has a dramatic impact on their grades and their ability to complete their education. Here Respondents, in effect, failed their sophomore year of high school. Their alleged infraction becomes a part of their permanent record, thereby influencing adversely their prospects of securing admission to institutions of higher learning or obtaining a decent job. Moreover, and most importantly, these children have been labeled as deviant and their activities as unlawful. In violation of the spirit if not the letter of state law, they are accused as minors of illegally obtaining an alcoholic beverage and making it available to still other minors. Teachers, parents, and their peers may treat them as rebellious, as unable to abide by reasonable standards imposed by society. Such expectations, accompanied by lower self-esteem, may well become self-fulfilling prophecies. In short, whatever the general power of state authorities to exclude students from the public schools, the manner of exclusion in this case, dramatically injuring Respondents' life prospects and their standing in the community, requires the observance of the basic guarantees of procedural due process.

2. Respondents have been deprived of an interest in property.

In *Board of Regents v. Roth, supra,* and *Perry v. Sindermann,* 408 U.S. 593 (1972), Mr. Justice Stewart, writing for the Court, established the currently applicable framework for analyzing whether a particular interest fell within the concept of "property" under the Due Process Clause:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, supra, at 577. See also *Arnett v. Kennedy, supra,* at 1650 (Mr. Justice Powell, concurring in part). The question then is whether the state so acted (by statute, rule, understanding, guideline or contract) as to give rise to a justifiable expectation of continued enjoyment of the state-provided benefit. See, e.g. *Goldberg v. Kelly, supra; Arnett v. Kennedy, supra,* at 1650 (Mr. Justice Powell, concurring in part); *Perry v. Sindermann, supra; Wieman v. Updegraff,* 344 U.S. 183 (1952). A unilateral expectation, a mere hope which is not based upon any act of the state, will not suffice. *Board of Regents v. Roth, supra.*

While Petitioners would have it that Respondents' expectation of continued public schooling is based upon noth-

ing more than their active imaginations, those expectations are in fact rooted solidly in and arise from the positive law of the State of Arkansas. The Arkansas Constitution provides that:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.

Art. 14, Sec. 1, Arkansas Constitution (1973). The state has thus undertaken an obligation to provide free public schools to its people. This provision, as implemented by the state when it established a system of public elementary and secondary education, and as reinforced when it made public education mandatory, secures for the children of Arkansas an entitlement to the benefits of public schooling and a legally sanctioned expectation of the continuation of their education in the absence of some particular justification for its termination.

Article 14 is further reinforced by a number of specific statutory enactments. Section 80-1501, Ark. Stat. Ann. (1973), for example, specifically states that *"the public school district shall be open and free to all persons between the ages of six and twenty-one years, residing in that district . . . . ."* (Emphasis added). Further, Section 80-1502, Ark. Stat. Ann. (1973), requires parents of children between the ages of seven and fifteen to send their children to public or private school under penalty of fine or prosecution. And Section 80-1516, Ark. Stat. Ann. (1973), restricts both the grounds for suspension from public schooling and the length of the suspension:

> The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness or other conduct that would tend to impede the discipline of the school, or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to suspend any pupil, subject to appeal to the board.

The thrust of these statutory provisions is that Arkansas at every turn affirms the expectation that Respondents will remain in the public school system until the twelfth grade so long as they do not engage in certain specified forms of misconduct. Indeed, the failure to attend the public schools gives rise to sanctions against the parents of the truant children. Thus, this case presents an even clearer case for finding a property entitlement than does the Court's decision in *Arnett v. Kennedy, supra,* in which six Justices held that a federal statute guaranteeing continued employment absent "cause" for discharge creates a sufficient property interest for due process purposes despite the statute's explicit provision that no hearing need be held. *Id.*, at 1650 (Mr. Justice Powell, joined by Mr. Justice Blackmun, concurring in part), at 1660 (Mr. Justice White, concurring in part and dissenting in part), at 1669 (Mr. Justice Douglas, dissenting), at 1673 (Mr. Justice Marshall, joined by Mr. Justice Douglas and Mr. Justice Brennan, dissenting).

Finally, it should be noted that Arkansas law does not specify any particular procedures which are required, or any which are to be foregone, when a student is alleged to have engaged in conduct forbidden by Section 80-1516, Ark. Stat. Ann. (1973). Thus this case is clearly more compelling than *Arnett v. Kennedy, supra.* For as Mr. Justice Rehnquist noted in *Arnett,*

> [T]he very section of the statute which granted [the Appellee] that right [to continuing employment except for cause] . . . expressly provided also for the procedure by which "cause" was to be determined, and expressly omitted the procedural guarantees which Appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon Appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it.

Id., at 1643 (plurality opinion of Mr. Justice Rehnquist). Compare *id.* at 1642 (Mr. Justice Powell, concurring). Respondents' justifiable expectations here were in no way diminished, as they at least arguably had been in *Arnett*, by the specification of procedures for suspension. Rather, the state statute addressed itself only to the substantive ground for suspension, a matter not here in dispute.

3. Petitioners Misconstrue San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Petitioners place great emphasis on *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). They argue, in effect, that *Rodriguez* completely insulates the actions of public school administrators from judicial review. That interpretation is plainly incorrect. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). From a narrower, though equally indefensible, perspective, Petitioners argue that this Court's determination in *Rodriguez* that education is not a fundamental interest for equal protection purposes is also conclusive with respect to its characterization as a liberty or property interest under the Due Process Clause. The premise of this argument is misleading; for this Court has never indicated that a complete denial of all educational opportunities, as in this case, would fail to give rise to a valid equal protection claim. The Court in *Rodriguez* simply held that relative inequalities in the distribution of a public resource, absent discrimination against a suspect class, should be tested by the traditional rational basis standard under the Fourteenth Amendment. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972). See L. Tribe, "The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law," 87 Harv.L.Rev. 1, 43-44 (1973). But more important, the adoption by this Court of Petitioners' argument would require the overruling of *Board of Regents v. Roth, supra*, and a long line of procedural due process decisions by this Court. See, e.g., *Mitchell v. W. T. Grant*, 42 U.S.L.W. 4671 (1974); *Goldberg v. Kelly, supra; Sniadach v. Family Finance Corp., supra; Slochower v. Board of Education, supra; Connell v. Higgenbotham*, 403 U.S. 207 (1971); *Bell v. Burson, supra.*

To begin with, this Court has never held that there must be a substantive constitutional entitlement to a particular benefit under the Constitution before the guarantees of procedural due process attach. In *Perry v. Sindermann, supra*, for example, Professor Sindermann never asserted, nor would the Court have perceived that he had, a right secured by the federal Constitution to teach at the Odessa Junior College. Nonetheless, this Court held that, if Sindermann could show the requisite property interest (by demon-

strating a reasonable expectancy of continued employment under an implied contract with the state), he would be entitled to due process procedures before nonrenewal of his contract. *Id.* at 603. See also *Slochower v. Board of Education, supra; Wieman v. Updegraff, supra.* Similarly, in *Goldberg v. Kelly, supra,* the Court never held that the plaintiffs were entitled to welfare benefits as a matter of federal constitutional law. See also *Dandridge v. Williams, supra.* Nonetheless, the state was required to afford a due process hearing prior to the termination of those benefits. *Id.,* at 264. The point is amply and poetically made by the often quoted language from *Cafeteria and Restaurant Workers Union v. McElroy, supra,* at 886: "One may not have a constitutional right to go to Bagdad, but the government may not prohibit one from going there unless by means consonant with due process of law."

Thus, whether the denial of all educational opportunities by the state would constitute a substantive deprivation of a constitutional right is irrelevant to the question of whether or not due process procedures must accompany that deprivation. As Section IB, subsections 1 and 2, *supra,* demonstrated, Respondents' interest in continuing their education can be and should be characterized as both a liberty and property interest. These students are entitled, therefore, to notice and a fair hearing whatever the status of their substantive claim.

The other fatal flaw in Petitioners' argument is a disregard for the nature of the property interests encompassed by the Due Process Clause. Property interests are created by state law or by other enactments and actions of state officials. Such interests are not creatures of the federal Constitution:

> [The] point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law. The Court holds today only that a state-employed teacher who has an implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. *Thus* [*the issue*] *hinges on a question of state law.* The Court's opinion makes this point very sharply: *"Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." Board of Regents v. Roth, supra,* at 577. (Emphasis added)

Perry v. Sindermann, supra, at 604 (Mr. Chief Justice Burger, concurring) (Emphasis added). To be sure, once the state creates a property interest, the scope of the due process guarantees to be afforded the injured party is a matter of federal constitutional law. See *Arnett v. Kennedy, supra* (Mr. Justice Powell, concurring in part). But it is the state that defines the underlying interest in the first instance. In this case, therefore, the question is not whether education is a substantive entitlement under federal law, but *whether there is some entitlement to education, or at least a justified expectancy of continued education, under Arkansas law.* Since the latter question must be answered in the affirmative (see part IB2, *supra*), the status of education as a nonprotected interest under an equal protection challenge to inequalities in its distribution is irrelevant for the purpose of applying the Due Process Clause to a complete deprivation of educational opportunity.

C. THE PUBLIC SCHOOLS ARE NOT "ENCLAVES" BEYOND THE REACH OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The thrust of Petitioners' brief is that public schools present such a specialized environment that due process rights have no application to decisions of school authorities. Petitioners' Brief, p. 14.) Even if Respondents' interest in remaining in the public schools can be aptly characterized as a liberty or property interest, they assert that institutional concerns render inappropriate the application of due process restraints on governmental decision-making. To the extent that Petitioners mean to assert that the form and timing of the required hearing must be determined by a weighing of the interest of the individual in fairness against the state's interest in efficiency, we have no difficulty with their position. The requirements of due process are flexible and may be varied as circumstances compel. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath, supra,* at 168. (Mr. Justice Frankfurter, concurring); *Cafeteria and Restaurant Workers Union v. McElroy, supra,* at 895; *Hannah v. Larche,* 363 U.S. 420, 440, 442 (1960). Recent decisions of this Court affirm this position. See, e.g., *Arnett v. Kennedy, supra,* at 1652 (Mr. Justice White, concurring in part and dissenting in part); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974); *Wolff v. McDonnell,* 42 U.S.L.W. 5190 (1974); *Mitchell v. W. T. Grant, supra.* But to the extent that their argument is to be taken at face value, as an argument that the Court should weigh the competing interests on the threshold question of the applicability of the Due Process Clause, it must be categorically rejected:

> ". . . a weighing process has long been a part of any determination of the *form* of hearing required in a particular situation by procedural due process. But to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake . . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth, supra,* at 570, 571.

The public schools are not enclaves of totalitarianism wholly beyond the reach of the Fourteenth Amendment. Cf. *Tinker v. Des Moines Independent Community School Dist., supra.* This Court addressed itself to the "enclave" theory in a number of military and prison cases decided last term. See, e.g., *Parker v. Levy,* 42 U.S.L.W. 4979 (1974) (military); *Pell v. Procunier,* 42 U.S.L.W. 5006 (1974) (prisons); *Wolff v. McDonnell, supra,* (prisons). In not a single instance did any Justice reject the application of due proces standards in the area under consideration. In *Parker v. Levy, supra,* both the majority and the dissent applied the doctrines of vagueness and overbreadth to the Code of Military Justice. What divided the Justices was the scope of those doctrines and the nature of their application in a military setting, not the more fundamental issue of applicability. Similarly, in *Wolff v. McDonnell, supra,* Mr. Justice White, writing for the majority, made it quite clear that due process rights are available to prison inmates:

> The State of Nebraska asserts that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen . . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. *There is no iron*

> *curtain drawn between the Constitution and the prisons of this country . . . . The prisoner may . . . claim the protections of the Due Process Clause. He may not be deprived of his life, liberty or property without due process of law.*

Id. at 5195. (Emphasis added). The only question in the case was how to reach an "accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application," *id.* at 5196, and it was only here that the majority and the dissent disagreed.

If the Due Process Clause applies to prison inmates and members of the armed forces, it is preposterous to assert that it has no application to the nation's public school students. The military is a "specialized society separate from civilian society." *Parker v. Levy, supra,* at 4982. It is a tightly organized society, designed to fight and be ready to fight wars, and dedicated to the survival of the nation. "Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Orloff v. Willoughby,* 345 U.S. 83, 94 (1953). So too, the prison inmate, by the very nature of incarceration for a crime, must be limited in his assertion of rights and privileges under the Constitution. As Mr. Justice Stewart stated in *Pell v. Procunier, supra:*

> An important function of the corrections system is the deterrence of crime. . . . [Incarceration] . . . also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. . . . Finally, central to all other corrections goals is the intitutional consideration of internal security within the corrections facilities themselves.

Id. at 4999. The very statement of the distinguishing features of military and prison life underscores the inappropriateness of applying standards derived from those settings to public schooling.

That the children of Arkansas are required to attend public schools in no way intimates that they are to be treated as prison inmates. They are not violators of the criminal law, they are not being "rehabilitated," and it is hyperbolic and inaccurate to suggest that school discipline problems approach those of penal institutions. Nor is military life a close parallel. To be sure, public school students have an obligation, not at issue here, to obey teachers and administrators, but the hardened discipline of military life, necessitated by considerations of national defense, does not have any counterpart in the modern public school. In short, the institutional role of the public schools is to educate our children to the skills and values necessary for economic well-being and participation in democratic government. While discipline plays its role, the overriding aims are to communicate information, provoke discussion and analysis, and promote the intellectual growth of the students. The restrictions on individuals necessitated by such goals, even in a compulsory setting, are significantly less far-reaching than in the military or penal institutions.

The role of the public schools in socializing children to American political values has always been recognized by citizens and educators (see generally G. Counts, *The American Road to Culture* (1930)) and has never been seriously challenged by this Court. As Mr. Justice Jackson stated in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1923), "The State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty, which tend to inspire patriot-

ism and love of country.'" *Id.* at 63, quoting from *Minersville School District v. Gobitis*, 310 U.S. 586, 604 (1940) (Mr. Chief Justice Stone, dissenting). See also *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Mr. Justice Brennan, concurring); *Pierce v. Society of Sisters*, *supra; Meyer v. Nebraska*, *supra*, cf. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934). But schools do not communicate exclusively through the planned curriculum. See generally D. Kirp and M. Yudof, *Educational Policy and the Law*, pp. 126-132 (1974). If children are to learn the American democratic ethic, the actions of school authorities must be consistent with that ethic. See W. Brennan, "Comment: Education and the Bill of Rights," 113 U.Pa.L. Rev. 219, 225 (1964). The schools cannot teach respect for the Bill of Rights and the requirements of due process if they flout it in their every action with respect to the welfare of their students. Thus, adherence to due process standards in the public schools, far from being inconsistent with institutional goals, is vital to their accomplishment. If anything, the public school system should be an "enclave" in which constitutional imperatives are more closely observed than in the society at large.

II. In Cases of Lengthy School Suspensions Due Process Requires Notice and a Meaningful and Timely Opportunity to Be Heard.

We have argued above that that Due Process Clause should apply to school expulsion cases, entitling Respondents to procedural protection. School children are neither convicted criminals in penal institutions nor members of the armed forces bound by the military tradition of obedience and discipline. But whatever the validity of these distinctions, it is clear beyond any doubt that the nation's school children must be afforded, at a minimum, the same procedural rights available to prisoners and servicemen. To do less would be to declare that the public schools are indeed enclaves of arbitrariness, enclaves beyond the reach of the Constitution, and that convicted criminals are entitled to a procedural fairness unavailable to our children.

The minimum requirements of due process are straightforward and non-onerous: a student subject to the denial of all educational opportunity for a substantial period of time must be accorded the following procedural rights:

1. "Advance written notice of the claimed violation and a written statement of the fact findings as to the evidence relied upon and the reasons for the disciplinary action taken." *Wolff v. McDonnell*, 42 U.S.L.W. 5190, 5198 (1974).

2. A meaningful opportunity to be heard, including the opportunity to present documentary evidence and to call witnesses if it would not be unduly disruptive of the educational process. Cf. *id.*

3. A prompt hearing, which, absent extraordinary circumstances, must precede the suspension. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970) with *Calero-Toledo v. Pearson Yacht Leasing Co.*, 42 U.S.L.W. 4693 (1974).

4. An impartial tribunal, *id.* at 5200, which is empowered to render a decision in the students' favor. See also *Arnett v. Kennedy*, 94 S.Ct. 1633 (1974); *Mitchell v. W. T. Grant Co.*, 43 U.S.L.W. 4671 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, *supra*.

If these rights are not extended to students, there can be no confidence in the rightness of the administrative deter-

mination of their case or in the legitimacy of the proceeding. Notice of the charges enables the student to marshall the facts and prepare his defense. *Wolff v. McDonnell, supra,* at 5198. Written records of the proceeding will enable the student to protect himself against collateral consequences based upon a misunderstanding of the nature of his misconduct, and to defend his cause before other tribunals. *Id.* The opportunity to be heard and to present documentary evidence and call witnesses assures the reliability of the school board's ultimate conclusions. And, obviously, the impartiality of the tribunal deciding the case is an absolute precondition to the rendering of a reliable and credible decision. Finally, the reasons for a prior hearing absent extraordinary circumstances are evident. Not only can an individual be significantly damaged by action taken before a hearing—the stigma of expulsion and lost school time in this case cannot be taken lightly—but in addition, because the posture of the parties changes, the issues may well be determined without fully open-minded consideration. For the decider may develop a stake in the action already taken without a proper hearing, and the position of the expelled student shifts from that of party to a dispute to that of supplicant with an attendant shift in presumption and burdens.

The federal court cases following *Dixon v. Alabama State Board of Education,* 294 F.2d 15 (5th Cir. 1961), have uniformly required these minimum ingredients. See, for example, *Hagopian v. Knowlton,* 470 F.2d 201 (2nd Cir., 1972); *Wasson v. Trowbridge,* 382 F.2d 807 (2nd Cir., 1967); *Woods v. Wright,* 334 F.2d 369 (5th Cir., 1964); *Williams v. Dade County School Board,* 441 F.2d 299 (5th Cir., 1971); *Esteban v. Central Missouri State College,* 277 F. Supp. 649 (W.D. Mo. 1967). Following the suggestion of Judge Rives in *Dixon* that the precise nature of the required hearing could only be determined from the circumstances of the particular case, there has been considerable variation in the decisions about issues like the degree of formality and promptness required of a hearing, presence of counsel, and the right to cross-examine witnesses. But there has been unanimity about the irreducible minimum.

This view of the minimal procedural guarantees required under the Due Process Clause does not suggest that a school discipline hearing must include the full panoply of procedural rights accorded a criminal defendant. Cf. *In Re Gault,* 387 U.S. 1 (1967). But those elements—listed above—which express "the rudimentary elements of fair play" must be observed. *Dixon v. Alabama State Board of Education, supra,* at 159. Moreover, this case does not require this Court to decide what protections, if any, might be required for very short-term suspensions or other instances of insignificant punishment, for this case clearly involves serious punishment under any conceivable view of that term.

III. Because Respondents in This Case May Not Have Been Accorded the Required Procedural Safeguards, the Case Should Be Remanded.

A. THE FEBRUARY 18, 1972 MEETING OF THE SCHOOL BOARD CLEARLY DID NOT REFLECT THE MINIMUM ELEMENTS OF DUE PROCESS.

The Board meeting was held on the evening of the same day that the Principal, Mr. Waller, suspended Respondents for one week. No notice of the Board Meeting was given to either Respondents or their parents. (Appendix, p. 54). The Principal had told Respondents merely that the matter would at some time be taken before the Board, and that their parents were permitted to be present at the Board meetings. Since this general statement to Respondents was made before the date or time for the meeting was set, this could hardly be considered notice—nor has anyone seriously suggested that it was. Neither Respondents nor their parents were present at the Feb-

ruary 18 Board meeting. If they had been present, they would have had an inadequate time to prepare their defense. *Wolff v. McDonnell,* 42 U.S.L.W. 5190, 5198 (1974). In short, there was not a single element of even a minimal due process hearing observed at the February 18 meeting.

B. THE MARCH 2 BOARD MEETING MAY NOT HAVE CURED THE PROCEDURAL DEFECTS OF THE PRIOR MEETING.

The record with respect to the March 2 meeting is fatally defective. The District Court, in holding for Petitioners, erroneously considered absence of malice dispositive.[5] At no stage of its proceedings did the District Court enter findings of fact as to the procedural adequacy of the disciplinary actions of the School Board. It entered no findings:

1. On Respondents opportunity to present evidence at the meeting of March 2, 1972;
2. As to whether the March 2 meeting was sufficient to remedy the deficiencies of the February 18 meeting; or
3. Whether, if there was a "hearing," it was timely.

Although the Court of Appeals expressed a view that the March 2 meeting of the Board might have cured the February 18 deficiencies, it quite explicitly refused to decide that question, because it based its reversal on its view that neither Board Meeting had accorded Respondents their

5. While it may be arguable that School Board members should be immune from punitive damages in the absence of a showing of malice, the complaint in this case also sought equitable relief, including "all other relief to which Plaintiffs may be entitled." (Appendix, p. 12). With regard to such equitable relief, or compensatory damages, this Court's earlier decisions make it quite clear that a showing of malice is not essential. *Monroe v. Pape,* 365 U.S. 167 (1961) (the term "willful" was not read into 1983). If the Respondents' Fourteenth Amendment rights were violated, they would be entitled to have their expulsion stricken from their records whether or not there is a showing of malice.

"substantive due process" rights. (Petition for Cert., p. A. 6).

1. The record fails to establish the timeliness of the March 2 hearing.

The decisions of this Court establish a presumption in favor of a prior hearing. That presumption can be overcome only when a prior hearing would substantially jeopardize significant interests of the public, see e.g. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 42 U.S.L.W. 4693 (1974); *North American Storage Co. v. City of Chicago,* 211 U.S. 306 (1908), or where a subsequent hearing can plausibly be said to reflect a fair accommodation of competing private interests. See *Mitchell v. W. T. Grant,* 42 U.S.L.W. 4671 (1974).

Nothing in this record suggests that any significant interest would have been impaired had the School Board complied with the prior hearing requirement. Of course, one can imagine justifications for suspending students pending the outcome of a procedurally adequate hearing. But none are revealed here. We do not urge the Court, however, to affirm the decision below; the School Board should be given an opportunity on remand to establish extraordinary circumstances.

Moreover, if the Court holds that a prior hearing is not presumptively required, or if Petitioners on remand should establish extraordinary circumstances, there still remains the question of the promptness of the hearing after exclusion. *Mitchell v. W. T. Grant, supra; Freedman v. Maryland,* 380 U.S. 51 (1965). If a hearing is not held expeditiously, students may be deprived of their right to attend school for a substantial period of time without any opportunity to assert and prove their innocence. We do not think it appropriate to urge this Court to decide in the first instance whether the March 2 hearing—12 days after the defective

hearing of February 18—would have met the constitutional requirement of promptness. We do think it appropriate, however, to urge the Court to underscore the significance of promptness as a matter of due process and to insist that the lower federal courts not approve the imposition of serious punishment without a specific finding that a *prompt* as well as procedurally adequate hearing has been held, a finding neither court below has made.

But even if the March 2 hearing is regarded as timely, there are serious reasons to doubt its adequacy.

2. The record fails to establish that the March 2 meeting provided a meaningful opportunity to be heard.

a. The record suggests that the March 2 hearing may have been limited to the issue of punishment.

The Superintendent of Schools, in his initial letter to Respondents' parents informing them of the March 2 hearing, told them of their right to petition the School Board for "reinstatement" of their children. (Appendix, pp. 137-138). As the Board's own minutes reveal, the March 2 hearing began with a statement by the Board's counsel of "facts established" at the February 18 meeting. (Appendix, p. 106). Consistent with the Superintendent's letter and the Board's minutes, the record reveals no attempt at the March 2 hearing to dispute the underlying facts, but only an effort to persuade the Board that the punishment was excessive. If indeed no other issue was open on March 2, the hearing on that date obviously could not have cured the defects of the February 18 proceeding. At very least, this case should, therefore, be remanded for a determination of the scope of the hearing held on March 2.

b. Even if the March 2 hearing was not limited to the punishment issue, it may have been tainted by the Board's own prior action.

As we have urged in Section II, one of the reasons for a presumptive requirement of a prior hearing is the risk that a subsequent hearing will constitute only a perfunctory review of an action in which the decider has acquired a vested interest. Even if the Court is unprepared to hold on this theory that the March 2 hearing, absent extraordinary circumstances, came too late, and even if the March 2 hearing is found to have been of sufficiently broad scope, the distinct possibility remains that the School Board did not approach its task on March 2 as a truly impartial tribunal. Deeming the "facts" to have been "established", it might simply have proceeded in a manner calculated to vindicate its own prior conclusions. Although it is certainly arguable that the Board should have an opportunity on remand to establish that this did not occur, the absence of any finding by the courts below on the impartiality of the Board as of March 2 precludes a conclusion on this record that the hearing of that date cured the procedural inadequacy of the meeting which preceded it.

CONCLUSIONS

For the reasons stated above, if the Court in the context of this case decides questions relating to the procedural rights of Respondents, this Court should declare that due process guarantees Respondents a meaningful and timely opportunity to be heard, and the Court should thus remand

for further proceedings consistent with the principles here described.

Respectfully submitted,

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